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Dreyer v. Moran, et al.

For IN THE

Supreme Court of the United States.

Filed April 18, 1902.

No. [illegible]

OCTOBER TERM, A. D. 1901.

EDWARD S. DREYER,
Plaintiff in Error,
vs.
THE PEOPLE OF THE STATE OF ILLINOIS,
Defendants in Error.

REPLY BRIEF AND ARGUMENT IN BEHALF OF PLAINTIFF IN ERROR.

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IN THE

Supreme Court of the United States.

No. 536.

October Term, A. D. 1901.

EDWARD S. DREYER,
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vs.
THE PEOPLE OF THE STATE OF ILLINOIS,
Defendants in Error.

REPLY BRIEF AND ARGUMENT IN BEHALF OF PLAINTIFF IN ERROR.

In plaintiff in error's brief, three points were presented for this court's consideration, as follows:

I.

THE OMISSION TO SWEAR THE BAILIFFS IN THE MANNER PRESCRIBED BY THE COMMON LAW AND THE STATUTES OF THE STATE OF ILLINOIS BEFORE THE JURY RETIRED TO CONSIDER OF THEIR VERDICT.

II.

THE DISCHARGE OF THE JURY ON THE FIRST TRIAL UNDER CIRCUMSTANCES IN THE CASE AT BAR.

III.

THE JUDGMENT OF THE CRIMINAL COURT OF COOK COUNTY, DIRECTING "THE WARDEN OR KEEPER OF SAID PENITENTIARY * * * TO TAKE THE BODY OF SAID DEFENDANT AND CONFINE HIM IN SAID PENITENTIARY * * * UNTIL DISCHARGED BY THE STATE BOARD OF PARDONS, AS AUTHORIZED AND DIRECTED BY LAW, PROVIDED SUCH TERM OF IMPRISONMENT IN SAID PENITENTIARY SHALL NOT EXCEED THE MAXIMUM TERM FOR THE CRIME FOR WHICH SAID DEFENDANT WAS CONVICTED AND SENTENCED."

We present the last point first for this court's consideration:

III.

THE JUDGMENT OF THE CRIMINAL COURT OF COOK COUNTY DIRECTING THE "WARDEN OR KEEPER OF SAID PENITENTIARY * * * TO TAKE THE BODY OF SAID DEFENDANT AND CONFINE HIM IN SAID PENITENTIARY * * * UNTIL DISCHARGED BY THE SAID BOARD OF PARDONS, AS AUTHORIZED AND DIRECTED BY LAW, PROVIDED SUCH TERM OF IMPRISONMENT IN SAID PENITENTIARY SHALL NOT EXCEED THE MAXIMUM TERM FOR THE CRIME FOR WHICH SAID DEFENDANT WAS CONVICTED AND SENTENCED."

No argument is advanced by defendants in error in support of the validity of the act under which the judgment in the case at bar was entered, other than the citation of the following cases:

George v. *The People*, 167 Ill., 447.
Conlon's Case, 148 Mass., 168.
Com. v. *Brown*, 167 Mass., 144, 146.
Oliver v. *Oliver*, 169 Mass., 592.
Com. v. *Crowley*, 168 Mass., 121.
Murphy v. *Com.* (Mass.), 43 L. R. A., 154.
Miller v. *State* (Ind.), 40 L. R. A., 109.
State v. *Peters*, 43 O. St., 629.

We admit that *George* v. *People, supra* (opinion by a divided court), passed upon the constitutionality of the law here in question (it being identical in its material provisions with the law of 1895). A large part of the opinion in the George case is devoted to the argument that the authority vested in the State Board of Pardons is not judicial, but is "what may be regarded as ministerial functions." (459.)

The cases cited by the Supreme Court of Illinois in support of this proposition (in *George* v. *The People*) are not in point and do not support the conclusion of the court.

These cases are to the effect:

That assessors valuing property for taxation, do not usurp judicial powers.

Porter v. *R. R. & S. Co.*, 76 Ill., 561.

That a decision of a board of supervisors that a bridge at a particular point is a necessity, is not the exercise of judicial powers.

People v. *Supervisors*, 47 Ill., 256.

That a report of the commissioners on a special assessment is not the vesting of a judicial power.

Wright v. *City of Chicago*, 48 Ill., 285.

As to the acts of commissioners whose duties were for the assessment of damages against property with reference to special assessments, etc., the Supreme Court of Illinois, says:

"The acts of the commissioners may therefore be considered as ministerial and not judicial. **They are the means by which the proceedings are initiated and the cause brought before the court, and for that purpose are valid.**"

Rich v. *City of Chicago*, 59 Ill., 286, 295.

In the last case upon the subject in Illinois, where a so-called ministerial body undertook to pass upon a substantial right of a person, even though it did not finally determine such right, that court held it was a judicial proceeding, and that the statute granting such power was unconstitutional.

People ex rel. Kern v. *Chase*, 165 Ill., 527.

In the George case, the court properly holds that:

"At common law the jury returned a verdict of guilty or not guilty, and the punishment was fixed by the court, and governed by the laws in force."

No one will contend that the passing of sentence by the court, after the finding of guilty by the jury, is not a judicial act. The passing of sentence and fixing the punishment has always been considered a judicial act. Under the law as it now stands, it is provided that the court shall not fix the punishment or the term of sentence. That judicial function, by the act in question, is now vested in the State Board of Pardons. The doctrine is universally affirmed that courts being a co-ordinate branch of the government are not, within their sphere, subject to legislative control.

Cooley's Constitutional Limitations, 113–115, 6th Edn.

Under the law in question, the court trying a defendant, is not permitted to decide, in its judgment, and under the circumstances in the particular case, what punishment should be inflicted, or what term of imprisonment should be imposed within the limitations provided by law. The court bases the argument that there is no exercise of judicial power in the act in question, vested in the State Board of Pardons, by reason of the fact that the pardoning power still remains in the governor. It is not contended that the pardoning power is a judicial act, and we admit that the technical right of pardon remains in the governor. The judicial power is put in

force by the act of the board in paroling the prisoner, thereby giving him his liberty in every particular, subject to recall under certain conditions, which conditions need never be invoked, and which conditions when invoked, are not subject to judicial review, and under which parole, whether his pardon be signed by the governor or not, the sentence of the paroled prisoner is shortened to such period as the State Board of Pardons may arbitrarily determine.

There is no provision in the statute in question which makes the parole of a prisoner under like circumstances and with equally as good behavior, mandatory upon the board; on the contrary, the exercise of parole power is not subject to review by any court under any conditions.

It is argued, however, that under the law in question, every sentence is now for the *maximum* term as provided by the statute defining the crime, and that if that term is shortened by the board, it is to the advantage and benefit of the defendant, and therefore he cannot complain.

If this be so, then the court passing judgment responds to the command of the statute, and not under the circumstances in each particular case to the dictates of his own judgment as to what the term of imprisonment should be within the limitations provided by the statute. That part of the power to judge is now immediately after sentence, vested in the Board of Pardons. That this was not the intention of the legislature is perfectly plain for instead of saying

"that the term of such imprisonment shall not be less than one year nor shall it exceed the maximum term provided by law" (Sec. 498).

it would have omitted the minimum of one year and simply provided that the punishment should not exceed the maximum term.

The clear meaning therefore, is that the sentence should be

some time more than one year and not exceed the maximum term, such time to be finally determined by the Board of Pardons. This is substituting for the judgment of the court trying the case, the judgment of the administrative officers appointed to carry out the sentence. 'Such an interpretation of the act seems to be a plain invasion of the functions of the judiciary.'

Authorities Relied on in Support of the Law

Conlon's case, 148 Mass., 168.

This case does not pass upon a law similar to the one now under consideration. In that case the defendant was sentenced to nine years imprisonment in the state penitentiary. Prior to the expiration of his sentence he was removed to the Concord Reformatory. On December 24, 1885, prior to the expiration of his sentence he received a permit to be at liberty

"issued with the approval of the governor and council"

which permit was subsequently revoked. The most that can be said of the case is that the governor of Massachusetts granted a pardon with conditions, which procedure has been upheld by this court in *ex parte Wells*, 18 Howard, 307, 315.

Commonwealth v. *Brown*, 167 Mass., 144.

The entire opinion of the court upon the question here under consideration is to be found at page 146, and is as follows:

"It is suggested again **without argument** that St. 1895, c. 504, under which the defendant was sentenced, is unconstitutional. This statute requires the sentence in certain cases to be for a term of not less than two and one-half years, **and not more than a maximum fixed by the court**, and not longer than the longest term fixed for the punishment of the offense. Such a sentence is in effect a sentence for the maximum **fixed by the**

court, unless a permit to be at liberty is issued as provided by Sec. 2. But the form of the sentence is made to recognize and carry out a policy familiar to our legislation and acted on heretofore without question. Pub. Sts., c. 222, Sec. 20. St. 1884, c. 255, Sec. 33. *Conlon's case*, 148 Mass., 168. Such a form of sentence does not make the punishment more severe than it otherwise would have been, and we see no reason why the law should not be construed to apply to all sentences, in the cases referred to, passed after the act goes into operation."

The reason, perhaps, that that court did not go into a consideration of the questions here raised may be found in its comment that:

"It is suggested that this statute is unconstitutional. No reason is offered for the suggestion."

Furthermore, the court there exercised the judicial power by fixing the maximum penalty in each case.

Oliver v. *Oliver*, 169 Mass., 542.

This was a libel for divorce. The constitutionality of indeterminate sentences was not involved. The only discussion on the subject is to the effect that,

"It is not to be presumed that the legislature, in adopting a system of indeterminate sentences for convicts in the state prisons, intends to change the rights of persons under the law relating to divorces. In our opinion those rights will be preserved by treating their sentences as in effect during the maximum term rather than only during the minimum term. * * * If injustice is done to libelees under the construction which we give to the statute, the legislature can easily furnish a remedy." (594.)

Commonwealth v. *Crowely*, 168 Mass., 121.

There is not a single word in the opinion in this case with reference to the validity of any statute or sentence of the kind involved in the case at bar. The entire opinion is with reference to certain evidence and a discussion of errors had upon the trial of the case.

Murphy v. *Commonwealth*, 172 Mass., 264; s. c. 43 L. R. A., 154.

The error assigned was that the sentence and committment pursuant to it, were wholly unauthorized and void, because the statute under which the sentence was imposed was *ex post facto*. It is true that in that case the court had occasion to pass upon *an* indeterminate sentence law, but it was considered and passed upon in that case upon the theory that

"The commonwealth contends that the provisions are in the nature of prison discipline, or of penal administration, or of criminal procedure." * * * (157.)

The only question there determined was that

"In no just sense can it be said, we think, that the duration of a sentence is uncertain, or that the determination of the term of imprisonment is taken from the courts, where it belongs, and left to prison commissioners." (159.) (Citing the Illinois cases.)

The language of the court in this case is *obiter* for the reason that it reversed the case with instructions to enter sentence under another law. It was contended in that case, as above quoted, that the provision of the act were in the nature of "prison discipline," and the court said:

"A statute which mitigates the penalty is not objectionable, though passed after the offense. Nor, speaking generally, are statutes which relate to procedure or penal administration or prison discipline, even though the effect may be, in the last two instances, to enhance the severity of the confinement." (157.)

(This is the contention of the Supreme Court of Illinois.)

The court must necessarily, therefore, have held that the law in question was not one providing in its nature for prison discipline, or penal administration, or criminal procedure, otherwise it would not have been *ex post facto*, and the judgment would have stood.

In commenting upon the latter case and the Massachusetts statute and cases in general, Circuit Judge Putnam, in the District of Massachusetts *in re Murphy*,* 87 Fed., 549, 552, says:

"At the outset, the act of 1895 declares that the court 'shall not fix the term of imprisonment.' If this were to be taken literally, it would clearly be unconstitutional if retroactive, because it would deprive a person charged **of a right to the judicial determination of his sentence,** given by the law existing when the offense was committed, as we have already shown. But the Supreme Judicial Court of Massachusetts has said that it is not to be thus taken, notwithstanding the fact that, by the effect of the act, **the term of actual imprisonment is practically fixed by the executive officers of the state.** * * * Under the act of 1895 he cannot entitle himself, as a matter of right, to a permit, but the whole is a matter of option on the part of the executve boards, to be exercised without any explanation or any reason given pro or con. Moreover, under that act, other important conditions were added which would permit the recall of a permit, and still others which would revoke it absolutely."

The court in deciding that case, referring to the opinion of the Supreme Court of Massachusetts, in *Murphy* v. *Commonwealth* (*supra*) says:

"The court apparently regards it all as a matter of prison discipline, which affects no substantial rights. * * * We have, however, grave doubts about the constitutionality of the statute of 1895 * * * and we have explained our doubts in order to show that we ought to give the petitioner an opportunity to apply to give bail, if he desires, pending an appeal to the Supreme Court."

The petitioner did not adopt the method suggested by Judge Putnam, but sued out a writ of error to this court , which was decided in *Murphy* v. *Mass.*, 177 U. S., 155, upon the question of twice in jeopardy.

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*A habeas corpus proceeding instituted by the defendant in the case last above cited.

Miller v. *Sate*, 149 Ind., 607; s. c., 40 L. R. A., 109.

This decision adopts the reasoning and conclusion of the Supreme Court of Illnois in *George* v. *People* (*supra*). The judgment was affirmed and the law in question upheld by three judges. Two judges dissented and held the law inquestion unconstitutional. The main reason of upholding the law is based upon the argument that

"such a sentence is in effect a sentence for the maximum fixed by the court, unless a permit to be at liberty is issued as provided by section 2."

As heretofore pointed out, it was not the intention of the legislature to make every sentence a sentence for the maximum term, otherwise why put in the provision.

"the term of such imprisonment shall not be less than one year. * * * "

The court also there held:

"That the judgment of guilty and sentence is complete and effective, so as to warrant and require the convict to remain in prison to the end of the maximum term fixed in the judgment of conviction, unless ministerial or administrative officers, the board of managers, acting under the authority of the act, shall shorten the term of service in case a reformation of the convict is effected. The power to do this is not judical power, but is a purely ministerial or administrative power. It is not more the exercise of judicial power **than the power of the governor to grant reprieves, commutations and pardons, after conviction."**

This reasoning is, we submit, fallacious.

In *exparte Wells* (*supra*), 18 How., 307, 309, this court said:

"It is also said that a President granting such pardon assumes a power not conferred by the constitution—that he legislates a new punishment into existence, and sentences the convict to suffer it; in this way **violating the legislative and** judicial powers of the government, it being the province of the first, to enact laws for the punishment of offenses against the United States, and that of the judiciary to sentence convict

for violations of those laws, according to them. It is said to be the existence of prerogative, such as the king of England has in such cases; and that, under our system, there can be no other foundation, empowering a President of the United States to show the same clemency.

* * * * *

In the first it is forgiveness, release, remission. Forgiveness for an offense, whether it be one for which the person committing it is liable in law or otherwise. * * * Without such a power of clemency to be exercised by some department or functionary of a government, it would be most imperfect and deficient in its political morality, and in that attribute of deity, whose judgments are always tempered with mercy."

We respectfully submit that the dissenting opinions of Justices Jordan and Howard, in the Indiana case, are in accord with principle and justice and completely refute the majority opinion.

State ex rel. v. *Peters*, 43 Ohio St., 629.

This case is principally relied upon by defendants in error. When fully considered, the opinion is of little value. That case was a *quo warranto*, instituted by the attorney general against the men constituting the board of directors of the Ohio penitentiary. In conclusion the court said:

"Whether under this act and the legislation adopted by the board a case might not possibly arise in which the personal rights of the prisoner would be infringed, it is impossible to say. **Until such case does arise, we need not consider the question. So far as the state has a right to inquire we hold this legislation valid."**

The law in question was attacked on two grounds. First, because it deprived the governor of his pardoning power; and, second, because the act provides for the exercise of judicial power. Point one need not be here considered, because we do not contend that the act in question in express language, deprives the governor of his pardoning power. With reference to point two, the court holds that it is not a delegation of

judicial power for the reason that it does not purport to discharge the prisoner or shorten his term of service, that it simply authorizes the board of managers to permit prisoners to go outside the building and enclosures of the penitentiary. Such prisoners, however, to remain in their legal custody and under their control.

It is not a conditional pardon, but the substitution of a lower for a higher grade of punishment, and is presumed to be for the culprit's benefit.

"The only party who could object is the prisoner and he cannot when it is clearly for his benefit."

The opinion, therefore, is of little weight in considering the question in the case at bar.

The illogical contention upon which we are now commenting is so squarely destroyed in one of the dissenting opinions, that of Chief Justice Howard in *Miller* v. *State*, 149 Ind., 607 (s. c., 40 L. R. Reports, 109), cited by defendant in error, that we quote from it.

"The clear meaning of the act, if, indeed, it does provide for an indeterminate sentence, is, rather, that the sentence should be for some time more than two years, and less than fourteen years, such time to be finally determined by the board of managers of the reformatory. That, however, would be to substitute for the judgment of the court trying the case the judgment of the administrative officers appointed to carry out the sentence. Such an interpretation of the act makes it a plain invasion of the constitutional functions of the judiciary. If on the other hand, it should be conceded that the sentence is, in effect, a sentence of imprisonment for the maximum period of fourteen years, then we have the anamoly that there is no gradation in the crime of burglary; that the ragged boy who lifts a latch and steals a loaf of bread for his suffering mother, brothers and sisters is to receive his fourteen years, quite the same as the crime-hardened reprobate who breaks into a banking house and carries off the life earnings of the aged and helpless depositors."

A court in passing sentence tempers its judgment by the necessity of the case. Under the statute here attacked the Board of Pardons has no authority to ameliorate the term of imprisonment or to issue a conditional pardon for any reason existing *prior* to the sentence. The illustration so tersely put by Chief Justice Howard could not appeal to the Board of Pardons and could not be taken into consideration by it. The board is governed in its action only and exclusively by the conduct of the prisoner *after* his committment.

To quote from another dissenting opinion, that of Judge Jordan, in the same case:

"The right to determine and decide as to the extent to which a convicted person shall be punished by imprisonment under and within the limits of an existing law cannot be wrested from the court and jury and lodged elsewhere. The provisions of the statute under consideration wholly rob the court of all judicial discretion in regard to the term of imprisonment, and in imperative language require it to sentence the prisoner to the custody of the board of managers of the reformatory for an indefinite term.

* * * * * *

The feature of the statute which leads me to condemn it as antagonistic to the constitution is that which unquestionably divests the judiciary of its rights and powers to a certain extent; and to this extent, and in this respect, the law, in my judgment is invalid and cannot be sustained; and this must be true without regard to the question of whether it invests some ministerial board or person with judicial functions. * * * It (the court) is not permitted to decide what, in its judgment, under the circumstances in the particular case, ought to be the term of imprisonment within the limits provided by law. The man who is convicted of the theft of a pie or a plug of tobacco of the value of 10 cents must be turned over to the prison officials to be restrained of his liberty for the same period as one who has committed the heinous offense of stealing his neighbor's hogs or sheep, of the value of $24. The court can exercise no discretion and decide in accordance with the dictates of his own judgment. This is so evident that a mere reading of the statute is sufficient to condemn it in this respect."

The fixing of the term of sentence by the State Board of Pardons is a judicial act. Upon the exercise of this judicial function the defendant is not entitled to be present or to be heard, nor is the act itself subject to review. This legislative enactment thus undertaking to pass an act

"operative upon liberty, life or propery, or judicial in its essence, is contrary to the due process demand of the constitution and void. The act simply usurps judicial authority."

Brannon on 14th Amendment, 297, and cases cited.

I.

With reference to Point I, the attorneys for defendant in error insist that the record recital that "*the jury were in charge of sworn officers*" is a sufficient answer to our contention that the officers were not sworn in the manner or at the time prescribed by statute and the common law. The same argument was urged in the Supreme Court of the state. In reply thereto that court says;

"Clearly, it is not a necessary part of the record, and we are inclined to the view that it should not be considered even a proper part, within the rule which precludes evidence tending to contradict a record." (372)

And the question considered by that court with reference to this point was:

"Whether the requirement of the statute is one which can be waived by the defendant by his consent, and if so, does the mere fact that he failed to object at the time, amount to such consent or waiver?" (372.)

And the Court upon this proposition says:

"The law making it the duty of the court to place the jury in charge of sworn officers is no more positive or imperative than the duty of seeing that the jury is kept together and not permitted to communicate with others, and we see no good

reason for holding that the one requirement may not be waived by a failure to object, as well as the other." (374.)

As an additional reply to this point, attorneys for the defendants in error contend that;

"The courts of Illinois have never reversed on such ground, (point I) except where it positively appeared of record that the officers were not sworn."

McIntyre v. *People*, 38 Ill., 514.
Lewis v. *People*, 44 Ill., 462.
Gibbons v. *People*, 23 Ill., 518.
Jackson v. *People*, 36 Ill. App., 88.

In *McIntyre* v. *People*, *supra*, the question was raised in no other way than in the case at bar.

In *Lewis* v. *People*, *supra*, the question was raised by an affidavit in support of a motion for a new trial, as in the case at bar.

In *Gibbons* v. *People*, *supra*, the question was raised for the first time on a motion for a new trial, and so far as appears from the record of the case, in the same manner as in the case at bar.

In *Jackson* v. *The People*, *supra*, it does not appear that the question was raised in any other manner than in the case at bar. The court in its opinion says:

"It was no part of the duty of the defendant to see that the officer was sworn, or to object to his taking charge of the jury until he was sworn. It was the duty of the People to see that this was done, or that it was waived by an agreement entered on the minutes of the court."

A large number of authorities are cited on page 9 of defendant in error's brief to the effect that:

"The principle that an accused may waive a right extends to the highest rights, even to those secured by the constitution."

It is unnecessary to review the great number of authorities cited. Both the Supreme Court of Illinois and this court are committed upon this proposition.

In *Dempsey* v. *The People*, 47 Ill., 323, the defendant was placed on trial for a felony. During the progress of the trial the jury heard the statement of a witness, who was not sworn.

In passing upon the question that court says:

"It may be urged that the error was waived, **inasmuch as the statement was not objected to by the accused** * * * It is an ancient maxim of the law that in capital cases the accused stands upon all his rights, and waives nothing. He then could not be prejudiced by failing to object to the introduction of this evidence. And the same may be said as an answer to the fact that he did not move to have it excluded from the jury. **It is the province of the judge trying the accused, to see that he has a fair and impartial trial, and if within his power, he should have prevented the statement from being made, and if that could not be done, then he should have, on his own motion, excluded it from the jury."**

For the reasons above stated the case was reversed.

In *Guykowski* v. *The People*, 1 Scammon (Ill.), 476, the court adhered to the same doctrine.

In *Perteet* v. *People*, 70 Ill., 171, the court held that the defendant might waive certain rights, but his express consent thereto must affirmatively appear of record.

In *Paulson* v. *The People*, opinion handed down February 21, 1902, by the Supreme Court of Illinois, that court held where a defendant had expressly waived of record, a trial by jury in a *misdemeanor case* that a trial by the court without a jury under such waiver, was of no effect, for the reason that the defendant could not, even by express consent, waive his constitutional right of trial by jury, the court saying:

"As jury trials in criminal cases, as known at common law, were such as followed upon indictment in a common law court, and as our constitution refers to the right of trial by jury as it

was understood at common law, then the prohibition against the right to waive a trial by jury cannot apply to misdemeanors, because the constitution provides that in cases of misdemeanors, a person may be held to answer without indictment." (56–57.)

"The misdemeanors to which we then (*Brewster* v. *People*, 183 Ill., 143.) referred in which a trial by jury might be waived, were such only as could be prosecuted otherwise than by indictment, as is clearly indicated in the concluding clause of the quotation. Though offenses punishable either by fine, or by fine and imprisonment in the penitentiary, have been classed as misdemeanors when it was necessary to determine as to the application of the Statute of Limitations prescribing a period for beginning prosecutions for such offenses (as in the Lamkin case, *supra*), or to determine whether judgments of conviction in such cases should be removed for review from the trial court to the Appellate or direct to the Supreme Court (as in the Baits case, *supra*), or whether counts for such offenses and for offenses punishable only by imprisonment in the penitentiary may be joined in one indictment (as in the Herman case, *supra*), still such offenses must, in obedience to the command of said section 8 of article 2 of our constitution, be prosecuted only on indictments preferred and returned by a grand jury. As to cases of that character the question whether they may be tried by the court without the intervention of a jury does not depend upon their classification as misdemeanors. *The tribunal which may lawfully try that class of cases is one, as we have seen, which, according to the course of the common law, had jurisdiction to try the guilt or innocence of persons who stood charged, by indictment, with the violation of the criminal law.* A jury was an essential branch of that tribunal, and it is not within the power of one accused by indictment of an offense which can only be lawfully prosecuted by an indictment, even with the consent of the State's Attorney, to confer upon the judge of such tribunal the power to try and determine as to his guilt or innocence without the intervention of a jury."

Hopt v. *Utah*, 114 U. S., 488, was a writ of error from this court to the Supreme Court of the Territory of Utah. One of the errors assigned was that the record did not comply with the statute of Utah requiring that the written charges of the court should form part of the record.

By the code of procedure of Utah the charge of the court to the jury "must be reduced to writing before it is given, *unless by mutual consent* of the parties it is given orally."

It was argued to the court that it was obligatory upon the defendant to raise the objection, and that the presumption of law was that the charge was in writing, as provided by the state.

In passing upon the question there at issue this court, in reversing the case, says:

"When the record shows that the jury were charged by the court nothing can excuse the omission to set forth in the record a charge in writing, except **express consent of the defendant that it should be given orally, and that consent must appear of record.** The record must either set forth the charge in writing, or a waiver by the defendant of such a charge. If it does neither, it fails to show what is made by express statute an essential requisite to the validity of the conviction, and contains upon its face a fatal error, of which the defendant may avail itself by appeal, without tendering a bill of exceptions.

"The duty of making up a complete record is the duty of the clerk; and the duty of seeing that the record contains everything that actually took place, necessary to support the conviction, is the duty of the district attorney. If the copy of record made up by the clerk of the District Court, and entered by the defendant in the Supreme Court of the Territory, was defective in a material point, the district attorney might have moved in the latter court to have the defect supplied by *certiorari* or other proper process. **The defendant and his counsel were under no obligation to cure, and cannot be held to have waived any defect in the record, but were entitled to take advantage, either in the Supreme Court of the Territory, or in this court, of any error apparent upon the record as it stood in that court.**

"Applying these principles to the record before us, the conviction cannot be supported. The record merely states that the court charged the jury, and does not state whether the charge was written or oral. If the charge was written, it

should have been made part of the record, which has not been done. If it was oral, the consent of the defendant was necessary, and that consent does not appear of record, and cannot be presumed."

In *Crain* v. *United States*, 162 U. S., 625, 644, the question arose as to whether or not a judgment of conviction might stand where the record did not show that the defendant had been arraigned.

In passing upon that question, this court says:

"Neither sound reason nor public policy justifies any departure from settled principles applicable in criminal prosecutions for infamous crimes. Even if there were a wide divergence among the authorities upon this subject, safety lies in adhering to established modes of procedure devised for the security of life and liberty. Nor ought the courts, in their abhorrence of crime, **nor because of their anxiety to enforce the law against criminals, to countenance the careless manner in which the records of cases, involving the life or liberty of an accused, are often prepared**. Before a court of last resort affirms a judgment of conviction of, at least, an infamous crime, **it should appear affirmatively from the record that every step necessary to the validity of the sentence has been taken.** That cannot be predicated of the record now before us. **We may have a belief that the accused, in the present case, did, in fact, plead not guilty of the charges against him in the indictment. But this belief is not founded upon any clear, distinct, affirmative statement of record, but upon inference merely.** That will not suffice. We are of opinion that the rule requiring the record of a trial for an infamous crime to show affirmatively that it was demanded of the accused to plead to the indictment or that he did so plead, is not a matter of form only, but of substance in the administration of the criminal law; consequently such a defect in the record of a criminal trial is not cured by section 1025 of the Revised Statutes, but involves the substantial rights of the accused.

It is true that the constitution does not, in terms, declare that a person accused of crime cannot be tried until it be demanded of him that he plead, or unless he pleads, to the indictment. But it does forbid the deprivation of liberty with-

out due process of law; **and due process of law requires that the accused plead, or be ordered to plead,** or in a proper case that a plea of not guilty be filed for him before his trial can rightfully proceed; **and the record of his conviction should show distinctly, and not by inference merely, that every step involved in due process of law, and essential to a valid trial, was taken in the trial court; otherwise, the judgment will be erroneous.** The suggestion that the trial court would not have stated, in its order, that the jury was sworn to try and tried "the issue joined," unless the defendant pleaded, or was ordered to plead, to the indictment, cannot be made the basis of judicial action without endangering the just and orderly administration of the criminal law. The present defendant may be guilty, and may deserve full punishment imposed upon him by the sentence of the trial court. But it were better that he should escape altogether than that the court should sustain a judgment of conviction of an infamous crime where the record does not clearly show that there was a valid trial."

It will be noticed from the dissenting opinion filed by Mr. Justice Peckham, that the same argument was there advanced as is advanced in the case at bar by the attorneys for defendant in error, as follows:

"A waiver ought to be conclusively implied where the parties had proceeded as if defendant had been duly arraigned, and a formal plea of not guilty had been interposed, and where there was no objection made on account of its absence until, as in this case, the record was brought to this court for review." (649)

II.

"The discharge of the jury on the first trial under the circumstances in the case at bar."

In reply thereto, attorneys for defendants in error cite numerous authorities with the conclusion that "the contrary doctrine prevails" in Pennsylvania, Tennessee, Virginia, and probably one or two other states.

In reply to the statement above quoted, we collate the authorities upon the proposition:

That there has been prior Jeopardy.

TENNESSEE.

Mahala v. *The State*, 10 Yerg., 235.

ALABAMA.

McCauley v. *The State*, 26 Ala., 135.
Nedd v. *The State*, 7 Porter, 187.
Cobia v. *The State*, 16 Ala., 781.
Ex parte Vincent, 43 Ala., 402.

VIRGINIA.

Commonwealth v. *Williams*, 2 Gratt., 570.

NORTH CAROLINA.

State v. *Ephriam*, 19 N. C., 162.
State v. *Altman*, 64 N. C., 364.

ILLINOIS.

Logg v. *People*, 8 Ill. App., 99.

MISSISSIPPI.

Whitten v. *The State*, 61 Miss., 717.

WEST VIRGINIA.

Crookham v. *The State*, 5 W. Va., 510.

NEBRASKA.

Conklin v. *The State*, 41 N. W., Rep., 788.
State v. *Schuckart*, 18 Neb., 754.

PENNSYLVANIA.

Commonwealth v. *Fitzpatrick*, 121 Pa. St., 109.
Highlands v. *Commonwealth*, 111 Pa. St., 1.
Commonwealth v. *Cook*, 6 S. & R., 577.
Commonwealth v. *Clue*, 3 Rawl., 497.

KENTUCKY.

O'Brien v. *Commonwealth*, 72 Ky., 333.
Robinson v. *Commonwealth*, 88 Ky., 386.

TEXAS.

Powell v. *The State*, 17 Tex. App., 345.
Wright v. *The State*, 15 S. W. Rep., 717.

OHIO.

Dobbins v. *The State*, 14 O. St., 493.
Poage v. *The State*, 3 O. St., 229.
Hurley v. *The State*, 6 Ohio, 399.

We cite authorities from twelve states which make for our contention. Attorneys for defendant in error admit the accuracy of this statement, for they do not challenge or comment upon a single authority cited in our opening brief.

In considering the various authorities cited by defendant in error with reference to the effect of the discharge of the jury, under the facts pointed out in our opening brief, this court will take into consideration the various provisions of our constitution and statutes with reference to jeopardy, criminal trials and trials by jury. And, while it may be that many of the authorities which are relied upon in defendant in error's brief do not cite the provisions of the constitutions of the respective states, or the statutes in force in those states, the decisions are necessarily based upon the provisions of the respective constitutions and statutes.

That There Has Not Been Prior Jeopardy.

ALABAMA.

Barrett v. *State*, 35 Ala., 406. That authority does not make against our contention.

See authorities cited on page 56 of our original brief, including:

Ned v. *State*, 7 Porter (Ala.), 187.
McCauley v. *State*, 26 Ala., 135.
Ex parte Vincent, 43 Ala., 402.

CALIFORNIA.

Ex parte McLaughlin, 41 Cal., 211.

Section 687 of the Code of Criminal Procedure of the State of California provides that "no person can be subject to a second prosecution for a public offense for which he has once been prosecuted, and convicted or acquitted." And the statutes of California likewise provide that a court may discharge a jury "if it satisfactorily appears that there is no reasonable probability that the jury can agree."

No such provision is in our statutes.

CONNECTICUT.

The case cited is *State* v. *Woodruff*, 2 Day, 504. Counsel has cited the entire opinion of the court. The Constitution of the State of Connecticut, (Sec. 9, p. 44 of the General Statutes and Constitution), makes no provision that a person shall not twice be placed in jeopardy for the same offense.

DELAWARE.

State v. *Updike*, 4 Harr., 581.

The entire report of this case (and no part thereof is the opinion of a court), is as follows:

"This case was tried on a previous day of this term; and the jury being unable to agree, after being up all night, were discharged by the court from rendering a verdict.

It now came up again before another jury, and the defendant was convicted.

Bayard, Jr., moved to arrest judgment, on the ground that the jury having been discharged in the former case without the prisoner's consent, he could not be tried again without putting him twice in jeopardy; but he afterwards withdrew his motion, being satisfied that the ground was not tenable."

GEORGIA.

Williford v. *State*, 23 Ga., 1.

Lester v. *State*, 33 Ga., 329.

In the former case the court, among other things, says:

"As to a mistrial being tantamount to an acquittal, that idea has long since been exploded; since the leading case between *Goodwin and the People of New York, in* 18*th Johnson's Reports*, this point has never been seriously pressed upon the courts.

The record does not disclose, whether the jury were permitted to take their breakfast on the morning of the day before they were discharged. They should have been allowed this indulgence. The idea of starving a jury into a verdict is against all philosophy. Hungry men are always quarrelsome. Brother Jonathan was feasted and flattered by the ambassador of John Bull into the Clayton-Bulwer treaty; while the roar of the British lion would have passed unheaded as the idle winds.

After the jury have been out all night, the courts should always, after suffering them to partake of refreshments, give them another opportunity to agree upon a verdict. If they then fail, the case may generally be considered as hopeless." (p. 3.)

In the opinion of the court in the latter case (*Lester* v. *State*) the court says:

"A candid inquirer cannot but admit that in a case of extreme or absolute necessity the jury may be discharged without the prisoner's being thereby acquitted." (p. 331.)

ILLINOIS.

Logg v. *The People*, 8 Ill. App., 106: This authority is sufficiently commented upon on page 43 of our opening brief. The authorities therein cited are the authorities holding squarely the doctrine contended for by plaintiff in error.

INDIANA.

Numerous authorities are cited by defendant in error from Indiana. However, the Supreme Court of Indiana has held, in *State* v. *Leunig*, 42 Ind., 541, that

"The mere ruling or finding of the court that the ends of justice require the discharge of the jury will not of itself be sufficient to establish a necessity for their discharge, especially when the facts in the record show that no such necessity existed. The judge might find that the ends of justice required the discharge of the jury and the continuance of the cause in order that absent witnesses might be procured or for any other cause, when in fact there was no necessity for it. We do not think it necessary in this case to reopen the discussion of the question as to when and under what circumstances the jury may be discharged without its being equivalent to a verdict of not guilty. We are satisfied that in the case at bar there was no necessity for discharging them, and that the court permitted no error in ordering the discharge of the prisoner."

Section 1828 of the Code of Criminal Procedure of the State of Indiana provides that the jury shall retire to consider their verdict in charge of an officer, who shall, when the jury have agreed upon their verdict, "return them into court (when so agreed) *or when ordered by the court.*"

The distinction between that statute and our own is apparent.

MARYLAND.

Hoffman v. *State*, 20 Md., 425, is cited with the comment: "This precise question was not involved." It is, therefore, unnecessary to review the authority.

MASSACHUSETTS.

Two authorities are cited from this state: *Commonwealth* v. *Purchase*, 19 Mass., 521, and *Commonwealth* v. *Bowden*, 9 Mass., 493. These authorities are decided under the provisions of the statutes of Massachusetts (Sec. 6, p. 1133, of the Public Statutes of Massachusetts), which provide that "no person shall be held to answer the second indictment for an offense of *which he has been acquitted by a jury upon the facts and merits.* * * *"

MICHIGAN.

Two authorities are cited from the State of Michigan, *People* v. *Schoeneth*, 44 Mich., 488, and *People* v. *Harding*, 53 Mich., 487. The twenty-ninth section of the Constitution of Michigan, to be found on page 54 of the General Statutes of Michigan (edition of 1882), provides that "no person after acquittal upon the merits shall be tried for the same offense." Thus it will be seen that under the Constitution of Michigan a man may be placed in jeopardy and tried again so long as there has not been "an acquittal upon the merits." This is not the constitution of Illinois.

MISSISSIPPI.

The cases there cited are referred to in our opening brief. (p. 56.)

NEW YORK.

The statute of the State of New York provides (Sec. 428 of the Criminal Code of the State of New York) that:

"After the jury have retired to consider of their verdict they can be discharged before they shall have agreed thereon only in the following cases:

1. Upon the occurrence of some injury or casualty affecting the defendant, the jury or some one of them, or the court, rendering it inexpedient to keep them longer together; or

2. When, after the lapse of such time as shall seem reasonable to the court, they shall declare themselves unable to agree upon a verdict; or

3. When with the leave of the court the public prosecutor and the counsel for the defendant consent to such discharge." (Page 170.)

Section 430 of the same code provides that:

"In all cases where a jury are discharged or prevented from giving a verdict by reason of an accident or other cause, except where the defendant is discharged from the indictment during the progress of the trial, or after the cause is submitted to them, the cause may be again tried at the same or another term."

People v. *Goodwin*, 18 John, 187

(notwithstandingthe statute cited, *supra*), simply holds that:

"Upon full consideration I am of opinion that although the power of discharging a jury is a delicate and highly important trust, yet that it does exist in cases of *extreme and absolute necessity.* * * * And in the present case, considering the great length of time the jury had been out, that the period for which the court could legally sit was nearly terminated and that it was morally certain the jury could not agree before the court must adjourn, I think the exercise of the power was discreet and legal."

NORTH CAROLINA.

Defendant in error cites *State* v. *Jefferson*, 66 N. C., 312. This case does not make against our contention, but, on the

contrary, the Supreme Court of North Carolina, in *State* v. *Altman*, 64 N. C., 364, lays down the rule as we contend it to be. (See p. 55 of our brief.)

OHIO.

Dobbins v. *State*, 14 Ohio St. Rep. 494.

In that case the Supreme Court says (502):

"For wise reasons no investigation is frequently permitted of what transpires in the consultations of the jury; and when they unanimously return their inability to agree it is conclusive of the fact that they have not agreed and may rightfully have its just weight in determining the question whether they are likely to do so. But as this must be mere matter of opinion in which they are often found mistaken it ought never to be permitted to take the place that the actual fact that they have deliberated so long has under all the circumstances attending it to convince the court that no agreement can be expected. When the court is so convinced and the facts are such as to justify the conviction the order discharging may be made. But as this order may most materially affect the legal rights of the party, and as a discharge without sufficient reason is in effect an acquittal, it must appear from the record, to justify holding him to a further trial, that the obstacle which the law will recognize as a necessity did in fact exist, that it engaged the attention of the judge, that his order was based thereon and was the result of consideration and decision. * * * But it is claimed by counsel for the state that this whole matter is one of pure discretion in the court where the trial is had. * * * We are of different opinion. It is one of the very clearest of the legal rights of the accused to require a verdict if one can be had, and we know of no case in which any one can be deprived of his legal rights at the mere irresponsible discretion of a court."

The Supreme Court of Ohio then reviews the decisions of New York, which are also seemingly against our contention, and with reference to those authorities say:

"But the decision of that court (N. Y.) is undoubtedly placed upon the ground that it was a matter of discretion in the court

below, and if the power had not been discreetly exercised there could be no remedy. This may be true in New York, but it is not true in Ohio."

This decision must be read in connection with section 7313 of the Ohio Code, which provides that:

"The court may discharge a jury without prejudice to the prosecution for the sickness of a juror, the corruption of a juror, or other accident or calamity, *or because there is no probability of the jurors agreeing, and the reason for the discharge shall be entered on the journal.*"

Notwithstanding this section of the statute the Supreme Court of Ohio has held that:

"In such case the record must show the existence of the necessity which required the discharge of the jury. Otherwise the defendant will be exonerated from liability of further answering to the indictment."

Dobbins v. *State*, 14 O. St., 493.

Poage v. *State*, 3 O. St., 229.

Hurley v. *State*, 6 Ohio, 399.

It will thus be seen that this authority makes for our contention and by no means makes against it.

RHODE ISLAND.

State v. *Nelson*, 33 L. R. A., 560.

This case was decided under the Rhode Island Constitution, article 187, which provides, unlike our constitution, that no person shall, "after acquittal," be tried for the same offense.

SOUTH CAROLINA.

State v. *McKee*, 1 Bailey, 161.

While this case may make against our contention, the court there holds the following:

"Taking, then, our own decisions, and those of the United States courts, of New York, and of England, together, we are enabled to say, that a jury, after they are charged, can be discharged, and the prisoner tried a second time, for the following causes only: 1st. The consent of the prisoner. 2d. Illness of one of the jury, the prisoner or the court. 3d. Absence of one of the jurymen. Or 4th. *The impossibility of their agreeing on a verdict.* Beyond these, I apprehend the court has no right to go. It is said that it is a matter of discretion with the court, to discharge the jury, whenever they may think it consistent with the ends of justice. It is true, it is a matter of discretion, but in the language of Junius, it is a 'legal discretion,' and must be exercised in conformity to known rules. Arbitrary discretion is but another name for caprice or favor. Under its exercise, the boldest may tremble, and the free be made slaves. It is better, therefore, to act upon a fixed rule, even if it should now and then enable the guilty to escape, than to act without a rule, to the terror and danger of the innocent."

TEXAS.

Moseley v. *State*, 33 Tex., 671.

The statute of the State of Texas provides that:

"If a jury fail to agree upon a verdict after being kept together a reasonable time they shall be discharged, and if there be time left on the same day another jury shall be empaneled to try the case, or the justice may adjourn not more than two days and again empanel a jury for the trial of such cause."

In several of the states above referred to the constitutions and statutes make provisions for the discharge of juries. There is no such provision in the Constitution of the State of Illinois, or in its criminal statutes. On the contrary, there is every provision preserved which can possibly tend to indicate that trial by jury shall be as at the common law, and that the common law therein referred to is the common law prior to the fourth year of James I. (Hurd's Rev. St. Ill., p. 418.)

In deciding the question of twice in jeopardy, this court

should not, we respectfully urge, decide it upon a question of convenience or judicial discretion, but upon the basis of a clear legal right vested in the defendant. If, under the circumstances in the case at bar, the trial court had a right to discharge the jury as they were about to agree on a verdict of acquittal upon the claim of "judicial discretion" then, who can deny that this same court would have kept this same jury considering the case, if, instead of standing nine for acquittal and three for conviction, they had stood nine for conviction and three for acquittal.

The life and liberty of a man, be he ever so guilty, should not be left to rest upon the vacillation of a judge, which is the other name for discretion.

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